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No. 931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Petitioner,

v.

STATE TAX COMMISSION OF MISSOURI, HUNTER PHILLIPS, Chairman, CARL E. DAVIS and J. RALPH HUTCHISON, Members, J. R. TOWSON, Secretary, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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January 1969

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OPINIONS BELOW

The opinion of the Missouri State Tax Commission (R. 982-1047) is not officially reported and is reprinted in a separate appendix to this Petition.[1] (A16). The

[1] The record before the Circuit Court of Cole County, Missouri, consisting of 101 pages, is cited as "R-1" *et seq.* The remainder of the record, including the transcript of the hearing before the Missouri State Tax Commission, is cited as "R. 1" *et seq.*

Circuit Court of Cole County, Missouri, did not render an opinion. (R-86). The opinion of the Supreme Court of Missouri (R. 923) is not yet reported; it is reprinted in the separate appendix to this Petition. (A1).

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on September 9, 1968. (R. 922; A15). A timely filed motion for rehearing was denied on October 14, 1968. (R. 981). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, of the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

Section 151.060(3) of Vernon's Annotated Missouri Statutes (hereinafter "V.A.M.S."), Mo. L. 1945 p. 1825 § 7, provides in pertinent part:

> "In assessing, adjusting and equalizing any railroad property for any year or years the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to . . . ."

QUESTIONS PRESENTED

1. Whether a state deprives an interstate company of property without due process of law when the state's assessing agency, in determining the value of the company's property within the state for ad valorem property tax purposes, refuses to consider the evidence presented by the company concerning such value and instead relies upon arbitrary and irrational formulas that have the effect of imputing to the company's property within the state a greater value than it in fact has.

2. Whether, in assessing property for ad valorem property tax purposes, reliance by a state agency upon knowledge or information that was not part of the record in the proceedings before the agency denies a company whose property is being assessed the full and fair hearing guaranteed to it by the due process clause of the Fourteenth Amendment.

STATEMENT

On June 23, 1966, the Missouri State Tax Commission placed an assessment for 1966 of $33,429,871 upon the Missouri "distributable property" of the petitioner, the Chicago, Burlington & Quincy Railroad Company (hereinafter the "Burlington" or the "railroad").[2]

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[2] The Missouri State Tax Commission is the agency of Missouri with statutory responsibility for assessing most of the property of railroads and other public utilities. V.A.M.S. § 138.420. Some railroad property, principally real estate that is not used directly in railroad operations, is assessed locally by county officials and is not the so-called "distributable property" here at issue. V.A.M.S. § 151.100. "Distributable property" is so named because it is valued statewide and the values are then distributed among the counties of the state for ad valorem taxation.

(E-24). The Burlington asserted that the assessment was excessive by $12,707,871. (R-2). It requested a hearing, which was held early in 1967.[3]

At that hearing the Commission explained its assessment through the testimony of a staff official, its Supervisor of Taxes (R. 757-882):

(1) A value per mile was placed upon each type of track reported by the Burlington in Missouri. (R. 759). Thus, for example, the Burlington's main-line track in the state was assessed at $20,000 a mile. (R. 765-66, 820). Since the Tax Commission attempts to assess property at 30 percent of value (R. 831-35; A14, A69), the assessment of main-line track at $20,000 a mile indicates a valuation of such track at $66,666 a mile. The Burlington's second main-line, branch-line and side tracks were assessed at lesser figures per mile. (Ex. 15; R. 762). Added together the assessment for all Burlington track totalled $19,350,233. (*Ibid.;* A59). The Supervisor of Taxes testified that he had no record of how the mileage values were derived; he knew only that they were based upon past assessments. (R. 760). No testimony or other evidence was offered

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[3] Initially the Commission scheduled a hearing for the afternoon of July 7, 1966, and mailed the notice of hearing so that it reached the Burlington's office in Chicago on the morning of that day. (R-22). In an administrative review proceeding the Circuit Court of Cole County sustained the Burlington's contention that this action in substance denied it a hearing; the court ordered that another hearing be scheduled and that due notice be given the Burlington of the time and place of such hearing. (R-46).

to justify the particular mileage values employed by the Commission. (R. 760-62, 819).[4]

(2) The Burlington's Missouri right-of-way was assessed at $60 an acre. (R. 759). As with the track assessments, no evidence was offered by the Commission to justify this figure. (R. 762).

(3) Values were placed upon all the buildings and other fixed property on the right-of-way of the Burlington in Missouri. (R. 759). These values were then multiplied by 2.26566. (R. 763). The Supervisor of Taxes testified that he did not know how this multiplier was derived, stating only that it had been used for the past five years. (R. 826).

(4) A value was then placed upon all the rolling stock of the railroad by use of a multi-faceted formula (R. 759): First, all of the Burlington's rolling stock, wherever located, was valued by a cost-minus-depreciation method, whereby straight-line depreciation at 5 percent a year was allowed, with a floor of 25 percent of original cost placed upon depreciated value. This figure was then further reduced by being multiplied by 47 percent, the so-called "equalization" factor. (R. 771-74). The Supervisor of Taxes had no idea of the origin of this 47 percent equalization factor. (R. 828). He testified, however, that it was used to reduce the value of the rolling stock to 30 percent of its true value,

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[4] The Commission had originally assessed the main line at $22,625 a mile, but that figure was reduced to $20,000 a mile at the request of the Burlington's tax agent. No explanation was offered by the Commission at the hearing for either the $22,625 or the $20,000 figure. (R. 819-20).

since assessments of all property in Missouri are generally at 30 percent of market value. (R. 830-34). The depreciated, equalized value for all rolling stock was then multiplied by a percentage ascertained by determining the ratio between main-line mileage in Missouri and main-line mileage in the system as a whole—15.021 percent. (R. 773). Multiplying the depreciated, equalized value of the rolling stock of the Burlington by this percentage resulted in an assessment of the rolling stock of the Burlington in Missouri at $14,526,955. (R. 774).[5]

The figures for trackage, acres of right-of-way, buildings and fixed property and rolling stock, derived by application of the formulas just described, were then added together by the Commission, resulting in a sum of $34,817,172. (R. 774-76). The Commission, however, acknowledged that some account must be taken of the functional obsolescence of property. The Supervisor of Taxes explained how allowance was made for obsolescence in the case of the Burlington:

The ratio between the net operating income of the Burlington in 1965 and its total book-value investment in transportation property in that year was calculated. (R. 775). This ratio, 1.99 percent, indicated that on book-value investment Burlington received a return of only 1.99 percent. The Commission believed that an appropriate income yield on railroad operating property would be 10 percent. It then subtracted 1.99 percent from 10 percent to develop an "economic obsolescence" factor of 8.01 percent. (R. 776). The Commis-

[5] The Missouri mileage formula for valuing rolling stock is fully explained in Norfolk & Western Ry. v. Missouri State Tax Comm'n, 390 U.S. 317, 321 (1968).

sion then reduced the sum of the values that it had found for track, acreage, buildings and rolling stock by 8.01 percent to account for the operating property's obsolescence. (R. 776).[6]

The Burlington sought to offer the Commission an alternative to its mode of assessment based upon its arbitrary factors and irrational formulas. By the railroad's first witness, a consulting valuation engineer who had worked 38 years for the California Public Utilities Commission, the Burlington attempted to prove the actual cash value of the railroad as a whole and the portion of the railroad attributable to Missouri. (R. 50-52, 119-22). The qualifications of this witness were held insufficient, and his evidence was not received. (R. 123; A20-A23).

A second witness called by the Burlington was its General Tax Agent, who attempted to testify as to how the actual cash value of railroad systems should properly be measured and as to the value of the Burlington's distributable property in Missouri.[7] (R. 266, 304-17,

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[6] The irrationality of so deriving the obsolescence factor will be discussed below. (Pp. 16-17, *infra*). However, it should be observed that the Commission did not even apply its 8.01% factor correctly. The Commission calculated that 8.01% of the Burlington's assessed value equalled $2,913,281 (actually 8.01% of $34,817,172 equals $2,788,855). (R. 776). But it subtracted as the obsolescence figure based upon the 8.01% factor only $1,353,384. (R. 774-76). Like so many other features of the Commission's decision, the reason for subtracting this sum as opposed to the larger sum was unexplained. (R. 776).

[7] The Burlington also called a former employee of the Tax Commission. (R. 195). The Commission refused to receive this witness's testimony that property in Missouri is systematically assessed at 30% of actual value, ruling that he was not an expert and his qualifications to testify were not established. (R. 196-98). The fact that property is assessed at 30% has, however, been taken as a fact throughout this proceeding. (R. 830-35; A14).

318-22). An objection to this witness's principal exhibit, which was offered to show the grossly excessive character of the assessment reached by the Missouri Tax Commission's formulas, was sustained by the Commission. (R. 323). This exhibit demonstrated system-wide and Missouri values as follows (Ex. T; R. 323):

1966 Missouri Tax Value Based on Use of Three Factor Formula: (I) Capitalized Earnings, (II) Market Value of Stock & Debt and (III) Depreciated Investment in Road and Equipment.

		System	Missouri*
	(000)	(000)	(000)
I Net Railroad Operating Income as reported to I.C.C. (5-year average—1961-1965)	$ 22,553		
Capitalized at 7%		$322,186	$ 48,392
II Stock & Debt Value: (5-year average—1961-1965) Stock at Market Value ($152.61)	$260,718		
Mtge. & Equipment Trust Debt	$223,372		
Total	$484,090		
Less Value of Non-Opr. Prop.	$141,484	$342,602	$ 51,459
III Depreciated Investment in Transportation Property 12/31/65:		$714,821	$107,366
Total I, II and III			$207,217
IV Average Above 3 Factors			$ 69,072
V Full Value Equalized at 30%			$ 20,722

* Allocation to Missouri is on Road Miles Operated Basis—15.02%

It was also shown that three neighboring states used similar formulas albeit with variations both in the weight given to each of the three factors and in the

manner in which some of the factors were calculated. (Exs. U, V, W; R. 327, 329, 331).[8] If Missouri had used these formulas (of Colorado, Iowa and Nebraska) the Missouri assessment would have been $18,288,556, $21,106,894 and $17,672,315 respectively. (*Ibid.*)

These comparative assessment techniques were not offered to compel the Commission to use any one of them, but rather to demonstrate that (1) Missouri's formula method resulted in an excessive assessment and (2) there were alternative reasonable methods that had been tested by use in other states. (R. 326).[9]

In a variety of ways the Commission made clear that it was not at all interested in the rationalization of its assessment practices suggested by the Burlington. Its primary approach was to attack the credibility of the witnesses offering the Burlington's evidence. Thus, it concluded in its decision that the testimony of the Burlington's General Tax Agent and the valuation engineer from California "is not credible and is not worthy of belief." (A79). Along the same lines the Commission found that the exhibits that the Bur-

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[8] For example, Iowa, in using the three factors, values investment in property on the basis of its reproduction cost less allowable depreciation. Since reproduction cost typically exceeds original cost, Iowa then reduces investment in property by 40% before averaging it with the values derived from stock and debt and earnings calculations. (Ex. V; R. 329).

[9] Burlington's counsel told the Commission that the railroad did "not contend that you [members of the Commission] are required to use [the Burlington's method of assessment] . . . ." (R. 44). The railroad did insist, however, as it does here that the Commission must in some way modify its formulas, for example, by increasing the obsolescence factor or reducing the arbitrary track values, to take account of the Burlington's data. (R. 45).

lington urged should be considered in reaching an assessment were "not original records or verified transcripts of figures appearing on original records of the Railroad; that they are argumentative, inaccurate, and not worthy of belief and not considered by the Commission as evidence." (A26). The Commission also found that the methods of finding true value in other states were not persuasive as to the methods of finding true value in Missouri, since these other states had higher tax rates and thus could offset low assessments to yield the same amount of tax dollars as a higher valuation by Missouri. (A31-A32, A42-A44).

Although it rejected the Burlington's evidence on grounds of credibility and reliability, the Commission at the same time purported to use some of the railroad's suggested techniques and statistics to justify the Commission's assessment. (Ex. 21; R. 795). In doing so, it chose a figure for stock and debt value of the railroad system that included nearly $150,000,000 of nonoperating property, even though Missouri's share of that property is not assessed by the State Tax Commission but is assessed locally. V.A.M.S. § 151.100. In addition, the Commission nearly doubled the book-value investment of Burlington property in Missouri by taking the Iowa replacement-cost approach to investment but, unlike Iowa, not reducing that value by 40 percent. See p. 9 n. 8, *supra*.

Finally, the Commission relied upon the testimony of its Supervisor of Taxes that the methods suggested by the Burlington for assessment could not be used since only 3 percent of the Burlington's stock is publicly held (the other 97 percent being held by the Great Northern Railroad and the Northern Pacific Railroad in equal parts). (A67-A68). The Commission's witness had observed that in 1965 just over 2,000 shares of

Burlington stock were traded and stated that this did not constitute a sufficiently large market for the stock to allow for valuation of the railroad by the stock and debt method. (R. 809-10). The Commission also cited the Supervisor's testimony that because the Burlington was controlled by two other railroads its annual earnings were not an accurate reflection of its true worth. (A 68).[10]

After holding its hearings the Commission made a final assessment on May 24, 1967, in the amount of $35,207,695, a $1,777,824 increase over its prior challenged assessment. (R. 776; A81). This higher sum resulted from the acceptance by the Commission of its formula approach to valuation of the railroad and the addition of $1,777,824 representing the assessed value of property that had been omitted in the earlier assessment. (Ex. 37A; R. 867).

The Burlington filed a petition for review of the Commission's action in the Circuit Court for Cole County. (R-51). It alleged, among other things, that the assessment violated the due process clause of the Fourteenth Amendment, in that the assessment was "arbitrary" and was based upon procedures that denied the railroad a "fair hearing." (R-65). That court affirmed the Commission's final decision in a judgment entered without opinion on September 28, 1967. (R-86).

Thereupon the Burlington appealed to the Missouri Supreme Court where it again urged that the Commission's assessment of its property was arbitrary and irrational and that the evidence it sought to introduce

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[10] In making this latter finding the Commission did not explain why railroad operating income could be used by the Commission to calculate the Commission's obsolescence factor, p. 6, *supra*, but not by the Burlington to compute the value of the railroad.

was wrongfully excluded and disregared by the Commission in violation of the due process clause of the Fourteenth Amendment (R-99).

The Missouri Supreme Court's response to the Burlington's constitutional challenge to the assessment was basically twofold. First, it observed that under a Missouri statute, V.A.M.S. § 151.060, and Missouri case law "the Commission could disbelieve plaintiff's evidence of value, even without other evidence" so long as it did not "act upon whim and without reason." (A 9). Holding that "the record and the Commission's findings do not demonstrate a studied rejection of or hostility to one side of the case before the Commission," the court allowed the Commission to reject completely the evidence offered by the Burlington as lacking credibility. (A8). In the same vein, the court also found that the Commission was not bound to any single formula, rule or method in making an assessment and that its assessment, even if reflective of overvaluation, would not be set aside unless shown by the taxpayer to be the product of "an intentional plan or design of discrimination" or "so grossly excessive 'as to be entirely inconsistent with an honest exercise of judgment.'" (A12).

REASONS FOR GRANTING THE WRIT

I

In holding that the Missouri Tax Commission could assess the Burlington on the basis of irrational and arbitrary formulas and in disregard of the rational assessment methods suggested in the Burlington's evidence, the Missouri Supreme Court has decided a substantial federal question in a way that does not accord with the applicable decisions of this Court.

Indeed, a decision of this Court rendered just last spring and involving another railroad assessment by the Missouri Commission establishes unequivocally the basic constitutional infirmity in the decision below. *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n,* 390 U.S. 317 (1968).[11] At issue in that case was only one facet of the Missouri Tax Commission's procedures with respect to railroads—the mileage formula for valuing rolling stock within the state—but the guiding principle stated by the Court is fully applicable here:

> "Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State." 390 U.S. at 325.

Applying this principle, the Court held that, while a mileage formula for allocating rolling stock values was rational on its face, resting as it did upon the assumption that the rolling stock of a railroad was evenly distributed throughout a railway system, in the *Norfolk & Western* case the taxpayer had shown that the application of the mileage formula to it resulted in such gross overreaching beyond the values represented by assets within Missouri as to violate the due process

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[11] The Missouri State Tax Commission rendered its decision here prior to this Court's decision in *Norfolk & Western.* Accordingly, it is not surprising that the Commission failed to follow the rule laid down by this Court in that case. The opinion of the Supreme Court of Missouri was announced after *Norfolk & Western.* The court did not, however, cite that case, partly perhaps as a result of the fact that the main brief for the Burlington was filed prior to this Court's action in that case. The railroad did cite the *Norfolk & Western* case to the Missouri Supreme Court in its petition for a rehearing en banc, but that petition was denied without opinion. (R. 981).

and the commerce clauses. The Court summarized its holding as follows:

> "We repeat that it is not necessary that a State demonstrate that its use of the mileage formula has resulted in an exact measure of value. But when a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in its particular case, the State is obliged to counter that evidence or to make the accommodations necessary to assure that its taxing power is confined to its constitutional limits. If it fails to do so and if the record shows that the taxpayer has sustained the burden of proof to show that the tax is so excessive as to burden interstate commerce, the taxpayer must prevail." 390 U.S. at 329.[12]

Compare *Baltimore & Ohio R.R.* v. *Aberdeen & Rockfish R.R.*, — U.S. —, slip opinion p. 5 (Nos. 13 and 15, decided Nov. 12, 1968).

The *Norfolk & Western* case, dealing with a formula that on its face was rational, is an a fortiori precedent in the present case. For the formulas relied upon by the Tax Commission in the instant case are irrational.

As explained above, the Tax Commission assessed each mile of track of the Burlington at a given fig-

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[12] While in this summary of its holding the Court alluded only to the commerce clause, in the final paragraph of its decision it stated quite clearly that "on the present record, Missouri has in this case exceeded the limits of its constitutional power to tax, as defined by the Due Process and Commerce clauses." 390 U.S. at 329-30. Accordingly, the *Norfolk & Western* case is fully applicable in the present litigation, despite the fact that the Burlington did not make commerce clause arguments as such in the lower courts, but instead relied upon the due process clause. See also National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 756 (1967).

ure. Main track was valued at $66,666 and assessed at $20,000 a mile. But the witness for the Commission testified that he was unable to explain how this figure was derived and could state only that it had been used in the past.[13] The same was true of the $60 an acre assessment placed upon land used by the railroad as right-of-way. Equally arbitrary was the 2.26566 factor used in the formula to arrive at the assessed value of the Burlington's buildings and other fixed property.

The formulas for determining the value of trackage, right-of-way and fixed property are properly characterized as irrational because they are based upon factors that are unexplained and bear no reasonable relationship to the valuation of the railroad's property. Other parts of the formulas used by the Tax Commission are irrational not merely because the factors are arbitrary, but also because on their face they do not achieve what they purport to achieve.

For example, the depreciated value of rolling stock is multiplied by a 47 percent factor to equalize the assessed value of rolling stock with the value of other property located in the state. A quotation from the opinion below reveals the irrationality of this factor:

> "Mr. Norfleet stated that employment of the 47% equalization factor reduced the value of rolling stock to the level of 30% of value which the

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[13] It is true that the Commission cited evidence that the Burlington had recently constructed a short segment of main-line track at a cost in excess of $66,666 a mile. (R. 474-75; A33). But such evidence cannot justify a valuation of all the Burlington track at that figure; much of the Burlington main-line was acquired and constructed over 100 years ago and would not be reproduced today at current costs. (R. 278; Ex. N; R. 280).

> Commission tries to achieve in assessments. He stated also that the formula used for the entire assessment brought C.B. & Q., and railroad property generally, to the desired 30% level of value." (A5).

The 47 percent factor used in assessing rolling stock is plainly irrational. If 47 percent of some value equals 30 percent of some other value, it is only by the sheerest accident.[14]

The irrationality of the 8.01 percent obsolescence factor (pp. 6-7, *supra*) is also easily demonstrated. Assuming, as the Commission did, that it must discount the book value of property to reflect its value in use, see *Great Northern Ry.* v. *Weeks,* 297 U.S. 135, 151 (1936); *Southern Ry.* v. *Kentucky,* 274 U.S. 76, 81-82 (1927), the use of the 8.01 percent factor was altogether arbitrary and unreasonable—even if the mathematics of its use had been correct (p. 7 n. 6, *supra*). As explained above, this figure was arrived at by determining that the railroad's net operating income showed a return of only 1.99 percent on the book value of its assets, whereas the Commission thought that 10 percent was an appropriate return. It then obtained the 8.01 percent figure by subtracting 1.99 percent from 10 percent.

But the comparison between the actual return on the book value of the railroad's property and some postulated desirable yield cannot be made by merely subtracting the former percentage figure from the latter.

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[14] In the *Norfolk & Western* case the railroad did not challenge the 47% equalization factor. See 390 U.S. at 321. Accordingly, nothing in the *Norfolk & Western* opinion in any way supports the notion that the use of a 47% factor in handling rolling stock was reasonable.

Instead, the comparison to be rational must be determined by dividing the larger figure into the smaller one. Thus, if a railroad should realize 10 percent on its property but is instead obtaining only 2 percent, its investment is only 20 percent effective (2 percent being 20 percent of 10 percent) and to account for obsolescence the book value of the property should therefore be reduced by a factor of 80 percent, not 8 percent. Thus, the 8.01 percent factor used by the Commission in determining obsolescence was completely irrational.

The Burlington could perhaps have rested below on the ground that the assessment was generated by a formula irrational on its face and was therefore invalid. *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n, supra* at 325. Compare *Louisville & N.R.R.* v. *Greene,* 244 U.S. 522, 554 (1917). However, the Burlington did not choose to do that. Instead, it offered copious evidence concerning the real value of the railroad and the appropriate share of that value that Missouri could tax. It proved that Missouri's portion of the railroad's worth taken as an average of its value in terms of stock and debt, capitalization of net income and book value of assets resulted in a valuation of only approximately $20,000,000, about $15,000,000 below the assessment reached by the Missouri Tax Commission's arbitrary procedures. The Burlington therefore placed itself within the rule of the *Norfolk & Western* case by coming forward with "strong evidence tending to prove that the . . . formula will yield a grossly distorted result . . . ." 390 U.S. at 329.

The Tax Commission, rather than following the mandate of this Court in *Norfolk & Western, i.e.,* counter-

ing the railroad's evidence or making accommodations necessary to insure that its taxing power was confined to its constitutional limits, simply refused to credit the Burlington's evidence.

Rejecting the testimony of the Burlington's expert witnesses as incredible and applying the best evidence doctrine in a peculiarly rigorous manner (pp. 9-10, *supra*) were transparent devices to avoid dealing with the Burlington's evidence on its merits. One need only contrast this approach to the railroad's evidence with the Tax Commission's tolerance of the evidence of its own witness; the Commission accepted every detail with respect to the manner in which the witness justified the assessment.

The attempt to depreciate the validity of the assessment method suggested by the Burlington on the ground that the Burlington is controlled by two other railroads was merely another contrived device to allow the Commission to ignore real evidence of value and rely upon its irrational formulas. The statement that the Burlington's earnings were affected by the fact that it is controlled by two other railroads was merely an assertion on the part of the Commission totally lacking substantiation. The two railroads that control the Burlington—the Great Northern and the Northern Pacific—are not its competitors, see *United States* v. *ICC*, — F. Supp. —, slip opinion p. 10 (D.D.C. Civ. Action No. 1132-68, decided Nov. 20, 1968), and therefore they have no reason to cause it to lose money. Indeed, they are in a position, because of geography, to channel traffic to the Burlington in preference to other lines. *Id.* at 9-10.

The Commission also stated that only the 3 percent of the Burlington stock that was not owned by the two controlling railroads was traded. It then relied upon testimony that stock prices were not an accurate indicator of the value of the railroad because "the purchase of stock '*should* enable the buyer' to contemplate he might assert some voice in the direction and control of the company involved." (emphasis in original). (A 68). But that observation certainly does not apply only to the Burlington. Railroads typically are such large business entities that rarely, if ever, can an individual shareholder rationally believe that the shares he holds will allow him to exercise control over corporate affairs.[15]

The objections advanced to the stock and debt and the capitalization of income methods failed to recognize that the Burlington did not insist that those methods alone must be used to measure the value of the railroad. Instead, it urged only that those methods be considered and be given some weight by the Commission in adjusting the assessment reached by arbitrary formulas. Moreover, the objections to the propriety of the use of these methods of valuation put forward by the Commission are squarely refuted by the fact that other state tax commissions employ these

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[15] It has long been accepted that valuing railroads on the basis of capitalization of income or the stock and debt method is the most accurate technique for obtaining assessments for ad valorem taxation purposes. See Martin, *Valuation of Railroads for Ad Valorem Taxation*, 33 Taxes 619 (1955).

methods in valuing the Burlington.[16] See *Chicago, B. & Q. R.R.* v. *Department of Revenue,* 17 Ill. 2d 376, 161 N.E.2d 838 (1959).

The Burlington has quite clearly borne the burden imposed upon it by the *Norfolk & Western* case and has shown that the irrational formulas used by the Missouri State Tax Commission generate an assessment far above the real value of the property employed by the railroad in the state.

II

In another important respect the decision below is inconsistent with guarantees of the Fourteenth Amendment. The Missouri Supreme Court met the Burling-

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[16] Other means employed below to sustain the Tax Commission's obliteration of the Burlington's evidence similarly will not bear scrutiny.

The errors involved in the Commission's attempt to utilize the railroad's suggested assessment techniques have been discussed, p. 10, *supra,* and do not need repeating.

The Missouri Supreme Court observed that the Burlington pays no greater share of its tax dollars to Missouri than it pays to other states. (A13-A14). That is beside the point. At issue here is the question of assessment, not the appropriate tax rate for property within Missouri. If Missouri's methods of assessment were sustained by this Court, there would certainly be no constitutional impediment to raising Missouri tax rates to generate more tax dollars than its neighboring states.

The court also compared the assessment entered against the Burlington with assessments entered against other railroads in Missouri. (A13). Such a comparison has no meaning without a further discussion of the nature of the operations of those railroads in Missouri as contrasted with the Burlington's. The Missouri Supreme Court did not engage in such a discussion. Moreover, it would be no defense to a charge of gross overreaching on the part of the Tax Commission in violation of the due process clause to recite that other railroads were subjected to the same overreaching.

ton's argument that the assessment was unsupported by competent evidence by relying upon Missouri statutory and case law to hold that Commission assessments can be overturned only if they "demonstrate a studied rejection of or hostility to one side of the case." The court went on to rule that no such hostility had been proved by the Burlington and therefore under Missouri law the Commission could totally disregard the Burlington's evidence even in the absence of evidence of its own. But an assessment, to be valid under the due process clause, must be based upon evidence.

It cannot be said that the Commission's witnesses produced evidence of the value of the railroad's Missouri property. As was demonstrated above, the principal witness for the Tax Commission merely recited the formulas used by the Commission and had no idea how most of the formula figures were derived. Such recitation was mere assertion, not evidence of value.

These is no doubt that the Burlington had a right under the due process clause to a hearing before the Tax Commission. *Londoner* v. *Denver,* 210 U.S. 373 (1908); *Turner* v. *Wade,* 254 U.S. 64 (1920); *Ricardo* v. *Ambrose,* 211 F.2d 212, 221 (3d Cir. 1954). Cf. *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n,* 390 U.S. 317, 326-29 (1968).

"[T]he right to a hearing means the right to a meaningful hearing." *Gonzales* v. *United States,* 348 U.S. 407, 415 (1955). To have a meaningful hearing a taxpayer must know what evidence is being used against him and must have a reasonable opportunity to meet that evidence. *Morgan* v. *United States,* 304 U.S. 1, 18 (1938); *Carter* v. *Kubler,* 320 U.S. 243, 247 (1943). Therefore, when the Commission made an ex-

cessive assessment of the Burlington's property on the basis of matters that were neither placed in evidence before it nor properly made the subject of official notice it deprived the Burlington of property without due process of law. See *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 530 (1946); *United States* v. *Abilene & So. Ry.,* 265 U.S. 274, 286-90 (1924); *Hornsby* v. *Allen,* 326 F.2d 605, 608, *rehearing denied,* 330 F.2d 55 (5th Cir. 1964).

That deprivation and the manner of its effectuation were particularly egregious because the property interests of the railroad that are at stake enjoy a high degree of substantive as well as procedural constitutional protection. *Fargo* v. *Hart,* 193 U.S. 490 (1904); *Union Tank Line Co.* v. *Wright,* 249 U.S. 275 (1919); *Wallace* v. *Hines,* 253 U.S. 66 (1920); *Southern Ry.* v. *Kentucky,* 274 U.S. 76 (1927); *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n, supra.* A procedural right is often recognized "not as an end in itself, but as a means of defending substantive interests." *Fay* v. *Douds,* 172 F.2d 720, 725 (2d Cir. 1949). If the substantive interests that are involved in tax assessments are to be effectively protected, it is necessary for the assessing authority to reveal the evidence, if any, upon which it bases its decision. If it fails to do this, as the Missouri Tax Commission has failed here, courts are deprived of the opportunity to exercise a meaningful judgment as to whether the assessing authority has exceeded the limits placed upon it by the due process and commerce clauses. "[F]or administrative decisions based on substantial evidence and reasoned findings . . . alone make effective judicial review possible . . . ." *Baltimore & Ohio R.R.* v. *Aberdeen & Rockfish R.R., supra, slip. op.* p. 5.

CONCLUSION

The decision below is squarely in conflict with the recent pronouncement of this Court in *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n,* 390 U.S. 317 (1968). The decision is also inconsistent with the right of the Burlington to have the hearing before the State Tax Commission guaranteed to it by the Fourteenth Amendment. The petition should be granted.

Respectfully submitted,

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